IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0305-MR

STACY THACKER — APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
2001-CR-00237

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

A Pike Circuit Court jury found Appellant guilty of the Murder of Brian Ray Tackett ("Tackett"), but was unable to agree upon his sentence, and the trial court thereupon discharged the jury and subsequently imposed a sentence of fifty years imprisonment.[1] Appellant, therefore, appeals to this Court as a matter of right[2] and argues that the trial court erred by (1) excluding a toxicology report performed on Tackett and (2) failing either to declare a mistrial or to strike a witness's testimony when it differed from the witness's earlier statement to the police. We disagree with Appellant's allegations of error and we affirm the judgment of the Pike Circuit Court.

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[1] KRS 532.055(4) provides: "In the event that the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the judge shall impose the sentence within the range provided elsewhere by law." See also RCr 9.84(1) and Holbrooks v. Commonwealth, Ky., 85 S.W.3d 563, 568-69 (2002).

[2] KY. CONST. § 110(2)(b).

II. BACKGROUND

On August 5, 2001, Tackett died as the result of a blunt force injury to his head. At trial, the Commonwealth proved that, a few days prior to his death, Tackett had informed Appellant's girlfriend that he (Appellant) had been cheating on her, that he was still cheating on her, and that he was bragging about it. When Appellant's girlfriend subsequently confronted Appellant about Tackett's allegations of his infidelity, Appellant told her not to listen to Tackett and then began searching for Tackett.

On the day of Tackett's death, Appellant called Tackett's mother's home, where Tackett lived, looking for him. He first talked to Tackett's mother at 7:15 or 7:20 a.m., and he made three additional unsuccessful calls during the day to Tackett's home in his attempts to locate Tackett.

David Ray lived on Pike County's Booker Fork Road, the same road on which the Tackett home was located. Ray was riding his ATV[3] on Booker Fork Road when he was asked by Appellant if he had seen Tackett. When Ray answered that he had not, Appellant left but came back later and asked him again. Ray further testified that Appellant was alone and driving a red pickup truck.

Deborah Roberts and her brother Ricky Roberts, also residents of Booker Fork Road, testified that Appellant stopped at their house and asked them if they had seen Tackett. Deborah responded that she had seen Tackett drive by on a four-wheeler. She then asked Appellant why he was looking for Tackett, and Appellant responded that he was going to kill Tackett, but then he snickered and said that he just wanted to

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[3] "ATV" is an abbreviation for "all-terrain vehicle." It is "[a] small, open motor vehicle having one seat and three or more wheels fitted with large tires. It is designed chiefly for recreational use over roadless, rugged terrain." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

talk to him because he had been telling his girlfriend a bunch of lies. Deborah and Ricky also confirmed that Appellant was alone and driving his red pickup truck.

Jackie and Darlene Robinson testified that Appellant stopped at their home later that evening looking for Tackett because he had seen Tackett's truck parked in their driveway. They explained to Appellant that the truck was parked there because Jackie was in the process of buying it from Tackett. They, too, confirmed that Appellant was alone and driving a red pickup truck.

The Commonwealth also called witnesses to prove that Appellant and Tackett were together shortly before Tackett's death at the location on Booker Fork Road where Tackett's body was found. Misty Hamilton was looking out the front widow of her house when she saw Tackett, who was on an ATV, talking to a man sitting in a red pickup truck. The ATV and the truck were parked facing opposite directions on Booker Fork Road. Although Hamilton could see Tackett clearly, she did not identify the man in the truck, and she did not see him get out of the truck or engage in a fight with Tackett. After she observed the men talking, she went into the kitchen of her home. But within a minute or two after going into the kitchen, Hamilton testified that James Quinn ("Quinn"), a neighbor, knocked on the door of her home and told her, "Call 911! They beat Brian!" Hamilton immediately went outside to check on Tackett while her neighbor called 911. She found Tackett lying face down in the road next to his ATV.

Quinn, Shane Bentley, and Nathan Slone were working on a truck across the road from Hamilton's house. Quinn testified that he heard Tackett's ATV stop, and he got out from the underbody of the truck and saw Tackett talking to someone who was sitting in a red pickup truck. Quinn then crawled back under the truck and heard the truck leave in a fast manner. A few minutes later, Quinn again came out from

underneath the truck, and observed that the pickup truck was gone and Tackett was lying in the road. Quinn then ran to Hamilton's house. Quinn did not hear any shouting by the men or see them engage in a fight.

Shane Bentley ("Bentley") testified that, although he did not observe the entire incident, he did see Tackett get hit twice in the back of the head while Tackett was sitting on his ATV and then saw Tackett fall off of the ATV onto the road. Bentley further testified that he did not see anyone get out of the pickup truck and that Tackett was not fighting back.

Dr. Greg Davis, Kentucky's Associate Chief Medical Examiner, performed an autopsy on Tackett. He testified that the cause of Tackett's death was "blunt force injuries of the head."

Appellant testified in his own defense. He admitted that he was searching for Tackett that day, but he claimed that the purpose of his search was only to confront him about Tackett's comments regarding Appellant's infidelity. Appellant admitted that he met up with Tackett on Booker Fork Road and confronted him about the conversation. According to Appellant: (1) he got out of his pickup truck and approached Tackett, who was sitting on his ATV; (2) after he spoke to Tackett about the exchange Tackett had with Appellant's girlfriend, Tackett spit on him; (3) Appellant then removed the keys from Tackett's ATV and threw them over to the side of the road; (4) while he was doing so, Tackett reached into the bed of Appellant's pickup truck, removed an axe that Appellant had placed in the bed of the truck, and swung the axe over Appellant's neck and began strangling him from behind; (5) Appellant fought back and eventually wrestled away the axe, but Tackett was still hanging onto him and was preparing to strike Appellant with his fist; (6) Appellant then struck Tackett with the axe until he let go

of him. Appellant thus claimed that he acted in self-defense in the face of Tackett's initial aggression with the axe as his weapon.

The jury found Appellant guilty of murdering Tackett, and the trial court accepted the jury's verdict. After deliberating for approximately two hours on the penalty, however, the jury informed the trial court that they were unable to reach a unanimous verdict on Appellant's sentence. Accordingly, the trial court discharged the jury, and at final sentencing, the trial court imposed a sentence of fifty years imprisonment.[4]

III. ANALYSIS

A. THE TOXICOLOGY REPORT

A toxicology report was prepared in connection with the autopsy performed by Dr. Davis. The Commonwealth had previously filed a motion in limine to exclude the introduction of the toxicology report into evidence. So, when Appellant's lawyer asked Dr. Davis about the importance of the toxicology report during the trial, the Commonwealth duly objected and the trial court held an in camera hearing on its admissibility. The toxicology report showed a very low level of oxycodone in Tackett's blood and only a "presumptive presence" of cocaine metabolites in Tackett's urine. While he testified that the oxycodone, potentially, could have had a pain dulling effect on Tackett, Dr. Davis was uncertain of the effect of the oxycodone on Tackett because he did not know how long Tackett had been taking the drug and he may have been acclimated to its effect. As for the cocaine metabolites, Dr. Davis pointed out that they were in Tackett's urine, rather than his bloodstream, where they could have an effect on him. Additionally, Dr. Davis explained that he rarely includes a presumptive presence

[4] See supra note 1.

of any substance in his autopsy reports since the result is not worth much without a confirmative test.

The Commonwealth argued that the evidence had little, if any, probative value and was highly prejudicial to its case. Appellant's lawyer countered that the toxicology report was a critical part of the autopsy since the autopsy was not finalized until the toxicology results were received, and furthermore, the results indicated the presence of drugs that may have dulled Tackett's pain and thereby may have enhanced his ability to fight in a struggle.

The trial court found that the toxicology report did not confirm the presence of cocaine in Tackett's system, and therefore, the evidence of cocaine was without probative value. As to the oxycodone, the trial court found that the drug was within the therapeutic range, or even less, and that the expert could not testify that it would have had any effect on Tackett's behavior or his ability to feel pain. As a result, the trial court found that the oxycodone evidence was of little probative value and that its admission would be highly prejudicial to the Commonwealth. Consequently, the trial court found that its probative value was substantially outweighed by its prejudicial effect. Based on its findings, the trial court sustained the Commonwealth's objection and excluded the toxicology report from being introduced into evidence by Appellant.

Appellant's argument on appeal is that the toxicology report was admissible under KRE 803(6), the business records exception to the hearsay rule. We agree that a toxicology report prepared as part of an autopsy report may qualify as a business record and thus be admissible,[5] but, as the Commonwealth states in its brief, this

[5] KRE 803(6); KRE 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."); KRE 703(a) ("The facts or data in the

argument misses the point. Regardless of whether evidence is admissible under the hearsay chapter as a business record, it may still be inadmissible by reason of another evidence rule.[6] And in this case, the trial court excluded the toxicology report because it found (1) that the evidence of cocaine lacked any probative value, and (2) that the probative value of the oxycodone evidence was substantially outweighed by its prejudicial effect. This weighing of the evidence by the trial court was proper under KRE 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

The trial court's findings regarding the toxicology report are supported by the evidence, and therefore, they are not clearly erroneous and subject to being set aside by this Court.[7] Accordingly, we hold that the evidence was properly excluded by the trial court.

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particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."; cf. Kirk v. Commonwealth, Ky. 6 S.W.3d 823 (1999) (holding that an autopsy report was admissible as a business record).

[6] Prater v. Cabinet for Human Resources, Ky., 954 S.W.2d 954, 958 (1997) ("If a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a business or public record.").

[7] CR 52.01 ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); Rockwell Intern. Corp. v. Commonwealth, Natural Resources and Environmental Protection Cabinet, Ky.App., 16 S.W.3d 316, 319 (1999) ("Since the trial court determines the credibility and weight to be given to evidence, it is the function of the trial judge to choose which evidence to accept. We will not interfere with that choice, unless it is clearly erroneous.") (citations omitted).

B. EYEWITNESS TESTIMONY

Bentley's trial testimony differed from the statement he gave to the police during their investigation of Tackett's death. At trial, he testified that, while working with friends on a truck, he saw Tackett, sitting on his ATV, parked directly beside a red pickup truck on the road just down from his friend's house, and that he saw Tackett fall from the four-wheeler to the ground after Appellant struck him twice while he lay slumped over its handles. In his prior signed statement to the police, however, Bentley claimed to have seen the two vehicles but denied seeing any physical interaction between the two men. Because of this discrepancy, Appellant claims that the trial court committed reversible error by failing to declare a mistrial or strike the testimony. We disagree.

First, Appellant failed to preserve this claim of error,[8] but asks us to review it under RCr 10.26[9] as palpable error. We may "consider an issue that was not preserved if [we] deem[ ] the error to be a 'palpable' one which affected the defendant's 'substantial rights' and resulted in 'manifest injustice.'"[10] "In determining whether an error is palpable, [we] 'must consider whether on the whole case there is a substantial possibility that the result would have been any different.'"[11] We note that the Commonwealth's evidence against Appellant was overwhelming. Additionally, we observe that Bentley's trial testimony was essentially consistent with his statement to

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[8] Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."); RCr 9.22; KRE 103(a)(1).

[9] RCr 10.26 ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

[10] Commonwealth v. Pace, supra at 895.

[11] Id.

the police with one difference: whether he saw Appellant hit Tackett. Of course, Appellant admitted at trial that he hit Tackett. But even excluding Bentley's testimony and Appellant's admission, the only reasonable inference to be drawn from the evidence was that Appellant hit Tackett. Accordingly, we do not find that a substantial possibility exists that the result would have been different absent the claimed error.

Second, regardless of the preservation issue, we hold that the admission of Bentley's testimony was not error. Appellant argues that the Commonwealth's failure to disclose that Bentley's trial testimony would differ from his statement was a violation of both RCr 7.24 and 7.26. We disagree. Neither rule requires such disclosure. The relevant subsection of RCr 7.24 states:

> (2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant). (emphasis added).

And, the relevant subsection of RCr 7.26 provides:

> (1) Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

Bentley was a witness; thus RCr 7.24 is not implicated. Bentley only informed the police and the Commonwealth minutes before he testified that his previous statement was incomplete; therefore, RCr 7.26 was not violated:

> The crux of the Appellant's argument is that the Commonwealth had a duty to advise the defense of the additional information from Officer Pinnegar as soon as it learned of the same.
>
> Despite the fervor with which Appellant presses this issue, he is unable to cite, and we are unable to find, any rule or precedent which would require the Commonwealth to take such action. RCr 7.26(1) is clear in requiring only written statements to be made available for use by the defendant. It is not an infrequent occurrence during a criminal trial that a witness who has produced or signed a written statement reveals details not contained in the document. There is no authority that would require a trial judge to confine a witness's testimony to the four corners of his or her written statement. Trial lawyers scrutinize the motive or basis for such omissions or additions through the art of cross-examination.[12]

Accordingly, we hold that the admission of Bentley's testimony was not error; thus it was not error for the trial court to strike his testimony or declare a mistrial.

IV. CONCLUSION

For the above reasons, we affirm the judgment of the Pike Circuit Court.

All concur.

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[12] Yates v. Commonwealth, Ky., 958 S.W.2d 306, 308 (1997).

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